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XI. DISTINGUISHED PANEL: SUPREME COURT PHILOSOPHY ON LABOR AND EMPLOYMENT ISSUES

Supreme Court Philosophy on Labor and Employment Issues

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It would not take a confirmed cynic to suggest that the title of this paper amounts to an oxymoron. That soft-hearted but tough-minded commentator, Florian Bartosic, and his collaborator, Gary Minda, came close to putting it in so many words: "[T]he Supreme Court lacks a consistent and coherent theory of labor law" (1982). My own view is somewhat different. First, lack of a consistent judicial philosophy is not all bad; at least it is better than a consistently wrong philosophy. Second, the vacillating theories of the Supreme Court tend to reflect the divergent attitudes of American society toward labor over the years. These are expressed, for example, in the variegated writings of such scholars as Atleson (1983), Bok and Dunlop (1970), Cox (1960), Northrup (1964), Tomlins (1985), and Wellington (1968), as well as in the quite dissimilar policy pronouncements of Congress in the Wagner (1935) and Taft-Hartley (1947) Acts. Finally, and here I most nearly agree with Bartosic and Minda, the Supreme Court has at times exhibited a profound misconception of the values of organized labor and the lives of ordinary working people, minorities and women in particular. But in fairness, those instances must be balanced against others in which the Court has displayed an almost startling insight into the realities of industrial relationships.

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It is not enough for our highest appellate tribunal to reach even right results in individual cases. Principled decision making is essential for the guidance of the lower courts and the administrative agencies. Sometimes that will mean overriding collective or union values, but at least those values deserve to be understood. My aim in this paper is to examine several illustrative decisions to demonstrate what I believe is a distressing confusion about basic principles and values. I shall first look at cases dealing with union-management relations and then at those dealing with employment discrimination and affirmative action.

Union-Management Relations

Strikes, Picketing, and Boycotts

Three years ago, in *TWA v. Flight Attendants* (1989), the Supreme Court ruled that at the end of an economic strike, an employer could retain employees who worked during the strike and not replace them with striking employees who had greater seniority, just as it could hire new “permanent replacements” from outside. In so holding the Court placed American labor law at odds with the law or practice of Western Europe and with the International Labor Organization’s latest interpretation of its guarantee of Freedom of Association (1991). Yet the *TWA* decision is but a modest and not illogical extension of the 50-year-old precedent of *Mackay Radio* (1938), which first established an employer’s right of permanent replacement. *Mackay* and *TWA* can be seen as trampling over incumbent employees’ hard-earned equity in their jobs, and as dismissing union people’s long-standing, deep-seated aversion to strikebreakers, or “scabs.” But what could be more in the American grain than the individualistic belief that the employer is entitled to enlist anyone’s aid—and promise permanent employment as an inducement—to keep its operations running? In thus elevating individual over collective values, the Court was arguably right in tune with the mind set of the 1980s.

To ask someone to make a lawful, independent, and totally uncoerced decision not to patronize a particular business would appear unexceptionable, and constitutionally protected as well. But if that self-same message, the better to be seen, is placed on a large sign and carried around, as is the working person’s wont, it is no longer an appeal to “reason” but instead a “signal” calling for an “automatic response” and hence subject to prohibition. So declared the best reasoned of several opinions supporting the majority position in *Safeco* (1980). The holding was that a union violated the secondary

boycott provisions of Taft-Hartley by picketing to urge consumers not to buy a particular primary product that constituted the major sales item of a neutral distributor. The badly flawed opinion of the Court did no more to meet First Amendment objections than to cite earlier decisions dealing with picketing addressed to union members. Wholly ignored was the important distinction between an appeal to a group, acting in accordance with group loyalties and even group discipline, and an appeal to individual members of the consuming public, acting in accordance with their own individual lights.

As if to underscore its downgrading of picketing as a means of communication, the Supreme Court was prepared in *DeBartolo II* (1988) to engage in some strained statutory construction in order to avoid constitutional questions and sustain the legality of handbilling asking customers not to shop at any of the stores in a mall where a nonunion builder was operating. Apparently picketing, organized labor's traditional mode of appeal and protest, falls into an entirely different category from handbilling and other methods of communicating. Regardless of its peacefulness, its location, or the lawfulness of its message if conveyed by another means, picketing may be treated as coercive *per se* and lose the First Amendment protections afforded other forms of speech.

Just when one is beginning to wonder whether the Court disdains the values most prized by the labor movement, along comes a line of decisions that looks very much in the opposite direction. In the *National Woodwork* (1967) and *Longshoremen* (1985) cases, the Court overrode the literal boycott language of Taft-Hartley and upheld work preservation clauses even though they seriously impaired technological innovation and productive efficiency in the construction and maritime industries. At the forefront of the Court's analysis was the primacy accorded free, voluntary collective bargaining, which has long occupied an honored place in the Court's pantheon. Perhaps it is that "free, voluntary" aspect of union-management negotiations which makes collective bargaining so attractive to a number of Justices. As we shall see next, however, even this relatively favored institution has its definite limitations.

Collective Bargaining

Over the past three decades, the most controversial issue regarding the scope of the duty to bargain has been the extent to which employers must negotiate about managerial decisions that result in a shrinkage of employee job opportunities. Under the Kennedy Labor

Board a wide range of managerial decisions were reclassified as mandatory subjects of bargaining. The Warren Court's *Fibreboard* decision (1964), dealing with the in-plant subcontracting of maintenance work, gave qualified approval to this development. But the Burger Court took a different tack in *First National Maintenance* (1981). Although the peculiar facts of *FNM* could narrow the significance of its holding, the case was described by the Court as involving "an economically motivated decision to shut down part of a business." The Court held, with only Justices Brennan and Marshall dissenting, that the employer did not have to negotiate with the union about that determination.

In *FNM* the Court first declared that a proposed subject must be "amenable to resolution" through collective bargaining. Then came a balancing test. Bargaining over a managerial decision would be required only if the "benefit, for labor-management relations . . . outweighs the burden placed on the conduct of the business." As the dissenters rightly objected, this supposed balancing tilted the scales against legitimate employee interests. It also ignored the increasing body of empirical data that union and employee input may greatly enhance the quality of management decision making. *FNM* was plainly a retrogressive movement in the Supreme Court's labor philosophy.

If *FNM* was a backward step, *Connell* (1975) was a headlong retreat. The Supreme Court held that a union lost its federal antitrust immunity when it sought and obtained an agreement from a general contractor that the latter would subcontract mechanical work only to firms that had a current contract with the union. For my purposes, the most significant aspect of the Court's decision was its characterization of the union's action as an attempted exclusion of potential business competitors from the subcontracting field, a matter of product market and antitrust concern. Surely most industrial relations experts would see the union's action as an effort to organize nonunion firms, a matter of labor market and labor law concern. Fortunately, in the subsequent *Woelke & Romero* case (1982), the Court limited *Connell* and held that a union was entitled to get a union-only subcontracting clause as long as it had a regular collective bargaining relationship with the employer. *Connell* remains important, however, in showing how critical may be the lens through which the Justices view a problem: is it a labor issue, or something else?

One aspect of collective bargaining has always been held in high esteem by the Supreme Court, namely, the provision for final and

binding arbitration of disputes between unions and employers. In part the explanation may be that arbitration implements one of the Court's most fervently espoused values, industrial peace. In part the explanation may be that arbitration saves the federal judiciary from what could be the crushing burden of adjudicating claims under more than 100,000 collective bargaining agreements across the country. At any rate, the Court in the *Misco* case (1987) did not even stop short of enforcing an arbitral award reinstating a discharged employee, despite the employer's contention that the award violated public policy by putting back on a dangerous paper-cutting machine a worker who had been fired for smoking marijuana.

Race and Sex Discrimination

The Concept of "Discrimination"

Title VII of the 1964 Civil Rights Act forbids an employer or a union to "discriminate" in employment because of an "individual's race, color, religion, sex, or national origin." The legislative history made clear that Congress was out to eliminate the classic form of discrimination—intentional, malicious, malign disparate treatment excluding minorities and women from desirable positions and equal benefits in the work force. In *Griggs v. Duke Power Co.* (1971), a unanimous Court spoke through Chief Justice Burger and added a whole new dimension to the concept of discrimination. An employer had excluded a substantially larger percentage of blacks than whites from certain jobs because the blacks lacked high school diplomas and scored lower on standardized tests. The Court held that, regardless of the employer's intent, the use of a job qualification would violate Title VII if it had a disproportionately adverse impact on a protected group and could not be shown to be a business necessity in its relation to performance of the job in question.

Later, in the *Manhart* case (1978), the Court stressed that Title VII focused on "fairness to individuals rather than fairness to classes." The Court went on to hold that female employees could not be required to pay more than male employees to help fund a retirement annuity providing equal benefits for males and females, even though women on the average live longer than men and it thus costs more to provide benefits for them. Many individual women, the Court pointed out, will not live as long as the average man. But this emphasis on the individual as a critical element in defining discrimination, helpful as it was in resolving the *Manhart* issue, would reveal some distinct deficiencies in other contexts, as the Court soon discovered.

Affirmative Action

The most sensitive and difficult problem in employment discrimination is that of affirmative action, or conscious race and gender preferences in hiring, promotions, layoffs, and other job determinations. The theory, of course, is compensation for past discrimination. The rub is that the individual beneficiary is often not an identifiable victim of that past discrimination, and the individual displaced is often innocent of any participation in the discrimination as well. Nonetheless, in the *Weber* case (1979), a 5-to-2 majority of the Court sustained under Title VII a private, voluntary on-the-job training program that reserved 50 percent of the openings for blacks until the percentage of black craftspersons in a plant approximated the percentage of black workers in the local area. The Court observed that the plan was adopted to eliminate persistent patterns of racially segregated jobs. Accordingly, the plan was in keeping with the very purpose of Title VII, and it would be "ironic" if it were outlawed by "a law triggered by a nation's concern over centuries of racial injustice."

While Justice Brennan emphasized on behalf of the *Weber* majority that the evident purpose of Title VII was to improve the lot of those formerly excluded from the mainstream of American employment, he said nothing about the abundance of legislative history indicating that the means chosen by Congress to achieve this objective was "color blindness." Similarly, there was no reference to *Manhart's* insistence that Title VII protects individual rights rather than group rights. White complainant Brian Weber, who had greater seniority than some of the black employees selected for the training program, could fairly claim that he as an individual was being deprived of a place because of his race. The Court was not above manipulating concepts of group versus individual justice to reach desired results. Finally, and most significantly, there was no attempt by the *Weber* majority to come to grips with the crucial statutory term, "discriminate."

This is not to say that *Weber* was wrongly decided. It is to suggest that the majority could not agree upon a coherent, convincing rationale of the sort that united the Warren Court in *Brown v. Board* (1954), the landmark school desegregation decision. I sympathize with Justice Brennan's tactical problems in fashioning his fragile majority in *Weber*. I still believe, however, that more could have been done to bolster the intellectual appeal of the opinion. For example, the

meaning of "discriminate" has evolved, so that it now connotes, not simple line drawing, but malign line drawing to someone's detriment or disadvantage. More important as a practical matter, the 15 years of experience following the passage of Title VII in 1964 had demonstrated the naiveté of some of its assumptions. "Color blindness" was not going to produce equality or even equal opportunity for groups long subject to deprivation and degradation. The socioeconomic reality of the position of minorities in our society, and in certain key respects of women as well, cried out for more positive steps. Finally, the *Weber* majority did not even mention that the U.S. Senate, in adopting the comprehensive revision of Title VII contained in the Equal Employment Opportunity Act of 1972, twice rejected by 2-1 margins proposed amendments that would have expressly forbidden affirmative action by both government and private parties.

The departure of Justices Brennan and Marshall leaves the future of affirmative action in considerable doubt. The Supreme Court's last major endorsement of preferential treatment, this time on the basis of sex, was *Johnson v. Santa Clara* (1987), decided 6-to-3 under Title VII. Justices Scalia, Rehnquist, and White dissented, with all three calling for the overruling of *Weber*. In the *Croson* case (1989), which struck down an extreme form of city-mandated affirmative action as a violation of equal protection under the Constitution, Justice Kennedy joined the majority in applying the "strict scrutiny" test on the grounds that race is a suspect classification even if used for a "benign" purpose. Newly appointed Justice Thomas has been an announced foe of affirmative action in the past. It is therefore possible that five votes are now available to overrule *Weber*, regardless of how Justice Souter might go. But precedents as significant as *Weber* are not lightly overturned, and the Court has generally seemed more tolerant of private affirmative action, subject only to Title VII, as distinguished from public plans, subject also to the Constitution.

Conclusion

The Supreme Court's labor philosophy is a crazy quilt. It often downplays cherished worker values, like collective action, and modes of expression, like picketing. At the same time it embraces other union priorities, such as work preservation and dispute settlement through binding arbitration. Similarly, the Court has wavered irresolutely in sorting out the various worthy but competing interests at stake in affirmative action programs. To an extent this ambivalence may simply reflect the pragmatic approach of most American problem

solving. There may also be a healthy attentiveness to factual differences in particular situations. In certain areas, however, with affirmative action the paramount example, one can only conclude sadly that there has been a dearth of moral leadership. At its best, as in *Brown v. Board*, the Supreme Court serves as the conscience of the nation, and we are the less when it shirks that function.

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